NO. 85-491

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1985

ANTHONY RAZZANO, EARNEST WALLACE,
JOE TIPPETT, d/b/a T & W TRUCKING COMPANY,

Petitioners,

vs.

DUNLOP TIRE & RUBBER CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Did the Order of the United States District Court dismissing Appellants' cause of action in strict liability constitute reversable error?

PARTIES

The parties to this proceeding are petitioner Anthony Razzano, Earnest Wallace, Joe Tippett, d/b/a T & W Trucking Company and respondent Dunlop Tire & Rubber Co., Inc.

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IN THE

SUPREME COURT OF THE UNITED STATES

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ANTHONY RAZZANO, EARNEST WALLACE,
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DUNLOP TIRE & RUBBER CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners, Anthony Razzano, Earnest Wallace, Joe Triplett, d/b/a T & W Trucking Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered April 16, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, entered on April 16, 1985 is unpublished, but is reproduced in the appendix of this petition, p. 1a, infra. Its unreported order denying rehearing entered on July 1, 1985 is reproduced at p. 1b, infra.

The United States District Court wrote no opinion. Its unreported final judgment, entered on November 23, 1983 is reproduced in the appendix, p. 1c, infra.

JURISDICTION

The Appellants named herein, in apt time and in open court, gave Notice of Appeal from the Judgment of the United States Court of Appeals for the Fourth Circuit, November 23, 1983. That from the Judgment of the United States Court of Appeals dated April 16, 1985 (Judge Widener dissenting) the Appellants timely filed Petition for

Rehearing and Suggestion for Rehearing In Banc, p. a, infra.

Judgment of the United States Court of Appeals denying the Petition for Rehearing (Judge Widener dissenting) was entered July 1, 1985, p. 1b, infra.

The jurisdiction of this Court to review the final judgment of the United States Court of Appeals for the Fourth Circuit is invoked pursuant to 28 USC § 1254(1).

STATUTORY PROVISIONS

Tennessee Code Annointed §29-28-105:

(a) A manufacturer or seller or a product shall not be liable for any injury to person or property caused by the product unless the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller.

(b) In making this determination the state of scientific and technological

knowledge available to the manufacturer or seller at the time the product was placed on the market, rather than at the time of injury, is applicable. Consideration is given also to the customary designs, methods, standards and techniques of manu-facturing, inspecting and testing by other manufacturers or sellers of similar products.

(c) The provisions of this section do not apply to an action based on express warranty or misrepresentation regarding the chattel.

(d) A product is not unreasonably dangerous because of failure to adequately warn of a danger or hazard that is apparent to the ordinary user.

STATEMENT OF THE CASE

On May 8, 1981, Appellants' purchased from the Defendant Dunlop Tire & Rubber Company a truck tire and mounted same on

the right front steering axle of a tractor trailer unit owned by the Appellants. On June 21, 1981, Appellant Razzano was operating that unit on Interstate Highway 40 at Jefferson City, Tennessee when the subject tire exploded, causing the vehicle to leave the roadway, overturn, and produce property damage and personal injury to the Appellant.

By letter of October 26, 1981, Dunlop was notified that initial examination of the tire had revealed a manufacturing defect and when responsibility for the referenced loss was declined, suit was then instituted by the named Appellants in the United States District Court for the Western District of North Carolina, alleging four separate and distinct causes of action:

1 - Strict Liability.

2 - Implied Warranty.

3 - Express Warranty.

4 - Negligence.

In August of 1982, pursuant to Motion filed by the Defendant, the trial court dismissed the Appellants' claim in strict liability, and in November 1983, refused Appellants' Motion prior to trial to reinstitute same, and refused to accept Appellants' request for jury instructions regarding strict liability. Following a jury verdict in favor of the Defendant, the trial court refused the Appellants' Motion pursuant to Fed. R. Civ. P. 50 for a new trial or for Judgment NOV.

From that verdict, Appellants gave Notice of Appeal to the United States Court of Appeals for the Fourth Circuit and hereby petition the United States Supreme Court for a Writ of Certiorari to review the affirmation of the judgment of the District Court by the United States Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Appellants respectfully submit

that the judgment of the District Court and the affirmation of that judgment by the United States Court of Appeals (Judge Widener dissenting) overlooks or ignores all existing case law and is in obvious conflict with prior decisions of the United States Supreme Court. The majority opinion of the Fourth Circuit Court of Appeals attempts to use a procedural vehicle to reach what the Appellants contend is a result that defies all justice and equity.

Certain salient facts of this case were uncontroverted:

1. The accident occurred in the State of Tennessee and all parties to this litigation were aware of that fact.

2. The substantive rights of the parties are controlled by the law of the State of Tennessee.

3. Tennessee law statutorily recognizes a claim in strict liability (Tenn.

Code Ann. §29-28-105).

4. Pursuant to Motion filed by the Appellees, Dunlop Tire & Rubber Co., the United States District Court struck the Appellants cause of action in strict liability.

5. The striking of Plaintiff's cause of action in strict liability was error and that error was brought to the attention of the trial court before the trial was begun.

6. The trial court refused to correct its error and tried the lawsuit pursuant to the laws of the State of North Carolina.

The Opinion of the Fourth Circuit Court of Appeals (Judge Widener dissenting) acknowledges all of the above facts but then attempts to justify the result by addressing not the dismissal of the Appellants' claim in strict liability, but rather by discussing an ancillary matter, the Rule 60(b) Motion filed by the Appellants prior to the start of the trial.

Whether Fed. R. Civ. P. 60 is applicable to this particular set of facts is totally academic. The Appeal is predicated on the dismissal by the trial court of the Appellants First Cause of Action in Strict Liability.

In a diversity case in Federal District Court, the Court is bound to follow the Choice of Law Rule of the forum state. Klaxon Company v. Stentor Electric Manufacturing Company, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 (1937); see also Santana, Inc. v. Levi Strauss & Co., 674 F.2d 269 (4th Cir. 1982).

As the Fourth Circuit Court of Appeals pointed out in Santana, supra, "In personal injury and wrongful death cases, North Carolina Courts have unequivocally adhered to the Lex Doci Deliciti rule. In determining the place of the tort, North Carolina

courts apply the generally accepted interpretation of the lex loci rule that the tort is deemed to have occurred where the last event takes place, that is necessary to render the actor liable. Injury being the last element of a tort, North Carolina Rule, in a nutshell, is the law of the place of the injury." Id., at 272 (citing cases); see also, Petrea v. Ryder Tank Lines, Inc., 264 N.C. 230, 141 S.E.2d 278 (1965); Matthews, Cremins, McLean, Inc. v. Nichter, 49 N.C.App. 184, 256 S.E.2d 261 (1979).

In a case similar to the matter at issue, the Fourth Circuit Court of Appeals in Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir 1969) held that Missouri law applied to the rights of a North Carolina domiciliary who was killed in an accident in Missouri caused by a defective tire manufactured in Ohio and sold in North Carolina. The Fourth Circuit

rejected the Plaintiff's argument that "the most significant relationship" test was applicable and applied to the law of Missouri, the place of the injury.

That is precisely what should have been done in this case.

The Plaintiffs' Complaint included a claim under strict liability in accordance with Tenn. Code Ann. §29-28-105 and the same was erroneously striken by the trial court, which, before trial, refused to correct its error.

The majority opinion of The Fourth Circuit Court of Appeals chooses to ignore all the above facts, the applicable law, and attempts to use a procedural vehicle to reach what the Appellants contend to be a thoroughly unjust result.

The rule of Lex Loic is so ingrained in the laws of North Carolina that there is a specific statute directing the courts

to take judicial notice of the laws of another state when they are applicable (N.C. Gen. Stat. §8-4). The very first contact made by the Appellants with Dunlop Tire Company placed the Defendant on notice that the accident had occurred in the State of Tennessee and there could be no argument of surprise.

The single issue presented for review here is whether the Appellants are entitled to have their cause of action adjudged under the strict liability statute in Tennessee. Under all existing case law and statute, the Appellants were so entitled and the actions of the trial court in striking the Plaintiffs' cause of action in strict liability and the majority opinion of The Fourth Circuit Court of Appeals affirming that action totally contradicts any sense of justice and all prior Decisions of the United States Supreme Court. The Appellants' position on this issue is

concisely spoken to by the dissent of Judge Widener, a copy of which is attached to Appellants' Petition, p.21a, infra.

CONCLUSION

For these various reasons, the petition for certiorari should be granted, to the end of remanding the case for a new trial based on errors of law committed in the original proceeding.

Respectfully submitted,

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APPENDIX

(UNPUBLISHED)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-2181

Anthony Razzana, Earnest Wallace,
Joe Tipett, T & W Trucking Company,

Appellants,

and

Desota Trails, Inc.,

Plaintiff,

versus

Dunlop Tire & Rubber Co., Inc.,

Appellee.

Appeal from the United States
District Court for the Western District
of North Carolina, At Charlotte.
Robert D. Potter, District Judge.
(C/A C-C-82-0404-P)

Argued: October 31, 1984
Decided: April 16, 1985

Before
WIDENER, PHILLIPS,
and
ERVIN,
Circuit Judges

W. James Chandler (Haynes, Baucom, Chandler, Claytor and Genton, P.A.) for Appellants; W. Donald Carroll, Jr., H. Landis Wade, Jr., (Helms, Mulliss & Johnston) for Appellee.

ERVIN, Circuit Judge:

The plaintiffs, Anthony Razzana, Earnest Wallace, Joe Tippett, and the T & W Trucking Company brought negligence, breach of warranty, and strict liability claims against the defendant, Dunlop Tire & Rubber Company, Inc., to recover for personal injuries and property damage caused by the explosion of a tire purchased from Dunlop that resulted in the overturning of plaintiffs' loaded tractor-trailer rig on Interstate 40. Prior to trial, the district court granted Dunlop's unopposed motion to

dismiss plaintiffs' strict liability claim under North Carolina law. On the day of trial, plaintiffs filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure to amend their complaint to include a strict liability claim asserting that under applicable Tennessee law they were entitled to pursue such a cause of action. This motion was denied by the district court.

At the close of plaintiffs' evidence, Dunlop moved for a directed verdict in its favor on all claims. The district court partially directed the verdict by dismissing all the warranty claims except for T & W's express warranty claim. Before the case was submitted to the jury, the parties agreed to withdraw T & W's express warranty claim from further consideration. On the remaining issue of negligence, the jury returned a verdict in favor of Dunlop.

The district court then denied plaintiffs' post-verdict motion for judgment notwithstanding the verdict or alternatively for a new trial. We affirm.

On appeal, the plaintiffs raise essentially four issues requiring our consideration. First, plaintiffs argue that the district court improperly denied their Rule 60(b) motion to add strict liability as another theory of recovery to their complaint. Second, plaintiffs assert that the district court erroneously dismissed all of their warranty claims except for T & W's express warranty claim. Third, plaintiffs contend that the district court committed numerous trial errors requiring reversal. Finally, they assert that the district court erred when it denied their motion for JNOV or alternatively for a new trial. We will address these arguments seriatim.

I.

FACTUAL BACKGROUND

After the purchase of a single tractor, plaintiffs Tippett and Wallace formed the T & W Trucking Company in early 1981. T & W then purchased two Remington Universal tube-type truck tires from a retail tire distributor not a party to this action. These tires were manufactured by Dunlop and covered by a limited warranty.

On June 21, 1981, Razzana, an employee of T & W, was driving the tractor owned by his employer and pulling a trailer owned by DeSota Trails, Inc., which contained a load of bottled beer weighing approximately 44,000 pounds. The beer was being transported from St. Louis, Missouri, to Franklin, North Carolina. On Interstate 40 near Jefferson City, Tennessee, the vehicle overturned because of a severe blowout in the right front tire, which was one of the

two purchased from Dunlop. The accident completely destroyed the tractor-trailer and injured Razzana.

II.

DENIAL OF THE RULE 60(b) MOTION

Acting on the assumption that North Carolina law applied, Dunlop moved to dismiss plaintiffs' cause of action in strict liability after they filed their complaint. Plaintiffs did not actively oppose this motion. Consequently, the district court dismissed the strict liability claim noting on the order that plaintiffs had agreed to the dismissal. Subsequently, the district court granted plaintiffs' motion to amend the dismissal order to indicate that they had not agreed to (although they never opposed) the dismissal of their strict liability claim. Over one year later, plaintiffs brought a Rule 60(b) motion to reinstate their strict liability claim.

Because this motion was not made until the day of trial, the district court denied it. Plaintiffs assert that the denial of this motion constituted reversible error. We disagree.

However untimely defendant's Rule 60 (b) motion, we recognize that plaintiffs were entitled to assert a claim in strict liability under governing Tennessee law.[1] Manifestly, the district court's dismissal of plaintiffs' strict liability claim was based on a misapprehension of the applicable choice of law rule. In addition, the

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[1] It is well established that federal courts in a diversity action must follow the choice of law rule of the forum state. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941). The applicable choice of law rule in North Carolina is that actions in tort are governed by the law of the place of injury. Santana, Inc. v. Levi Strauss & Co., 674 F.2d 269, 272 (4th Cir. 1982); see also Shaw v. Lee, 258 N.C. 609, 610, 129 S.E. 2d 288, 289 (1963). Since the explosion of the tire occurred in Tennessee, the substantive law of Tennessee

district court's subsequent refusal to grant plaintiffs' Rule 60(b) motion to reinstate their strict liability claim because it was untimely permitted the case to be tried and judgment rendered under an erroneous view of the permissible theories of recovery. We now turn to the question of whether this mistake of law requires reversal.

Plaintiffs' Rule 60(b) motion was brought prematurely. The rule only grants relief to "a party or his legal represenative from a final judgment order, or proceeding." Fed. R. Civ. P. 60(b) (emphasis added). The district court's dismissal of plaintiffs' strict liability claim was an unappealable interloctory order because the order could not be certified for appeal as a

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Foot note 1 continued:

supplies the available theories of recovery in this case. Further, Tennessee law permits recovery for injuries inflicted because of a manufacturing defect based on strict liability. Tenn. Code. Ann. §29-29-105 (1983).

partial final judgment under Rule 54(b) of the Federal Rules of Civil Procedure.

Appeal through certification that there is no just reason for delay is available under Rule 54(b) only if there has been a final determination with respect to one or more but fewer than all of the separate parties or claims in a single action. Fed. R. Civ. P. 54(b); see also Federal Civil Appellate Jurisdiction: An Interlocutory Restatement, Law & Contemp. Probs., Spring 1984, at 28-31 (hereinafter cited as Interlocutory Restatement). Alternative legal theories of recovery do not constitute separate claims under Rule 54(b). Page v. Preisser, 585 F.2d 336, 339 (8th Cir. 1978); CMAX, Inc. v. Drewry Photocolor Corp., 295 F.2d 695, 697 (9th Cir. 1961); Schwartz v. Eaton, 264 F.2d 195, 197 (2nd Cir. 1959); see also Interlocutory Restatement, supra, at 31. Plaintiffs'

negligence and strict liability claims were merely alternative legal theories and not separate claims subject to certification under Rule 54(b). Moreover, the district court never certified its dismissal order for appeal in compliance with the requirements of Rule 54(b). Because the district court's of the strict liability claim was not a final order, plaintiffs' Rule 60(b) motion was improper.

Given the impropriety of the Rule 60(b) motion, we are required to consider it as a motion by the plaintiffs to amend their complaint under Rule 15 of the Federal Rules of Civil Procedure. Because plaintiffs did not bring this motion until the day of trial, they could amend their complaint only by leave of the district court. Fed. R. Civ. P. 15(a). The denial of plaintiffs' motion to amend their complaint cannot be reversed unless we find

that the district court abused its discretion. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971); Karkell v. Blue Shield, 687 F.2d 543, 550 (1st Cir. 1982).

Although recognizing that the dismissal of the strict liability claim may have been based on mistake, the district court denied the motion explaining:

> (I)f we allow people to come in here and change the theory, particularly after the time that you have had to advise the Court or make the motion based on mistake, the other party is never going to be able to prepare his defense because (Dunlop), I assume, has gone on the theory that strict liability is not applicable in this case because that count was dismissed, so I am going to have to deny your motion.

(JA 94). Plaintiffs did not oppose Dunlop's motion to dismiss their strict liability claim. Rather, they waited until a year had passed and the day of

trial had arrived to assert that their strict liability claim should be reinstated. Plaintiffs offered no reason for their delay. Although we might have reached a different conclusion,[2] we are firmly convinced that the district court's refusal to permit amendment of the complaint on the day of trial was not an abuse of discretion.[3]

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[2]To avoid unnecessary appeals such as this one, we would have permitted plaintiffs to amend their complaint and granted Dunlop a continuance to avoid undue prejudice. Our choice, however, is of no consequence in this matter. The only question is whether the district court's denial of the motion was so extraordinary and unjustified that it constituted an abuse of discretion.

[3]Despite our preferred characterization, we note that plaintiffs' mischaracterized Rule 60(b) motion could also be considered a motion to amend the district court's Pretrial Order limiting the "legal contentions" and "claims for relief" to those alleged before January 28, 1983, absent good cause to extend the deadline. Under this alternative avenue of analysis, however, our conclusion that the district court did not abuse its discretion by refusing to permit plaintiffs to add belatedly another theory of recovery is equally

See, e.g., Kirby v. P. R. Mallary & Co., 489 F.2d 904, 912 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974) ("It would be unjust to permit an untimely amendment, materially altering the basis of the action, necessitating additional discovery, conferences, and pretrial orders and statements. . . ." especially when the plaintiff "showed no reason for this delay."); Vine v. Beneficial Finance Co., 374 F.2d 627, 637 (2d Cir.), cert. denied, 389 U.S. 970 (1967) (no abuse of discretion to deny amendment of complaint

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Footnote 3 continued

compelled. Since a pretrial order under Fed. R. Civ. P. 16 may be "modified only to prevent manifest injustice," while Fed. R. Civ. P. 15(a) permits amendment of the complaint "when justice requires," the district court has even greater discretion to decline to modify a pretrial order than an untimely request to amend the complaint. Whether plaintiffs' mischaracterized Rule 60(b) motion is deemed a request to amend their complaint or modify the pretrial order, the district court acted safely within its wide discretion in these two important areas of pretrial procedure.

because of undue delay); Stanek v. Trialmobile, Inc., 283 F.2d 827, 829 (7th Cir. 1960) (district court's refusal to permit amendment of the complaint to state a new cause of action on the day of trial was not an abuse of discretion because the delay was "without any reason").

III.

DISMISSAL OF THE WARRANTY CLAIMS

Plaintiffs argue that the district court erroneously dismissed their implied warranty claims because N.C. Gen. Stat. 99B-2(b) (1979) violates the equal protection clause of the fourteenth amendment. Essentially, plaintiffs contend that because N.C. Gen. Stat. 99B-2(b) permits employees of a purchaser not covered by workers' compensation to maintain a product's liability action directly against the manufacturer despite their lack of privity, while not allowing employees covered by

workers' compensation to bring such an action, the statute violates the equal protection clause. This argument is unpersuasive.

Because N.C. Gen. Stat. 99B-2(b) neither involves a suspect class nor impermissiblty burdens a fundamental right, it is persumptively constitutional and the distinctions drawn thereunder must merely bear a rational relationship to any imaginable legitimate state interest. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); see also City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976); Katzenback v. Morgan, 384 U.S. 641, 657 (1966). The clear legislative purpose behind the N.C. Gen. Stat. 99B-2(b) is to protect only those employees who are not already entitled to recover for their losses under workers' compensation. That legitimate state objective is clearly

furthered by giving only employees not covered by workers' compensation the right to maintain an action for breach of implied warranty. Accordingly, N.C. Gen. Stat. 99B-2(b) is not constitutionally infirm under the equal protection clause.

IV.

ALLEGATIONS OF TRIAL ERRORS

Having assumed that the cumulation of many meritless claims will result in a favorable disposition on appeal, plaintiffs argue exhaustively that the district court committed approximately seventeen separate trial errors. Without discussing each allegation of error, we conclude after having carefully reviewed the record and the briefs that none of plaintiffs' asserted trial errors are sufficiently meritorious to warrant reversal. Thus, we refuse to disturb the district court's trial rulings.

V.

POST-TRIAL MOTIONS

Finally, plaintiffs contend that the district court erroneously denied their motion for JNOV or alternatively for a new trial. We find that these contentions are also without merit.

The denial of a motion for JNOV cannot be reversed on appeal unless there is no evidence upon which a jury could have reasonably returned a verdict for the non-moving party. Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891 (4th Cir. 1980); Mays v. Pioneer Lumber Corp., 502 F.2d 106, 107 (4th Cir. 1974), cert. denied, 420 U.S. 927 (1975). Absent undisputed facts that "are so convincing that reasonable men could not differ as to their significance," the jury's verdict must be left undisturbed. United States v. Grannis, 172 F.2d 507, 513 (4th Cir.), cert. denied,

337 U.S. 918 (1949). Further refining our standard of review, we are also mindful that where, as here, the "party who bears the burden of persuasion on a particular issue seeks a judgment notwithstanding the verdict on that issue, he must establish that the evidence in support of the motion 'is so one-sided as to be of overwhelming effect.'" Coburn v. Browning Arms Co., 565 F. Supp. 742, 745 (W.D. La. 1983) (quoting Grey v. First National Bank, 393 F.2d 371, 380 (5th Cir.), cert. denied, 393 U.S. 961 (1968); see also Jefferson Amusement Co. v. Lincoln National Life Insurance Co., 409 F.2d 644, (5th Cir. 1969) ("A more stringent standard is imposed on a movant having the burden of proof."); 9 C. Wright & A. Miller, Federal Practice and Procedure, §2536 (1971). Finally, an appellate court must give the nonmoving party the benefit of all reasonable inferences from the evidence

before ruling on a motion for JNOV. Connelly v. Prudential Insurance Co., 610 F.2d 1215, 1220 (4th Cir. 1979). Guided by these principles of review, we conclude that there was more than sufficient evidence upon which a reasonable jury could find that Dunlop did not negligently manufacture the exploded tire. Therefore, the district court correctly denied plaintiffs' motion for JNOV.

No jury verdict may be set aside and a new trial ordered unless "'the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice. . . .'" Williams v. Nichols, 266 F.2d 389, 392 (4th Cir. 1959) (quoting Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 352 (4th Cir. 1941)); accord Ellis v. International Playtex, Inc., 745 F. 2d 292, 298 (4th Cir. 1984); States v. Shipp, 409 F.2d

33, 36 (4th Cir.), cert. denied, 396 U.S. 864 (1969). The district court has wide discretion in determining whether to order a new trial. Huber v. Nassau County, 557 F.2d 322, 325 (2d Cir. 1977). The record in this case reveals that the verdict exonerating Dunlop was amply supported by the evidence produced at trial. The evidence was credible and there was no miscarriage of justice. Hence, the verdict was not against the clear weight of the evidence and the district court's denial of the motion for a new trial was not an abuse of discretion.

In accordance with our resolution of the foregoing issues, the decision of the district court is hereby

AFFIRMED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

The preliminary procedural aspects of the trial in question were all that started on the afternoon of November 9th, the first day of the trial. Little was done on that day except strike the jury, and even that may not have been completed because the jury was not impaneled until November 10th.

It was on that day that the Plaintiffs' attorney filed his motion calling to the attention of the court that its prior ruling striking out that part of the complaint with respect to strict liability was erroneous. It is now acknowledged, even by the defendant, that the previous ruling of the district court, applying North Carolina rather than Tennessee law, was in error.

At that time, as the majority acknowledges in notes 2 and 3 of its opinion,

the district court should have asked the defendant if it requested a continuance on account of the correct law being brought to the attention of the court. If the defendant had stated that it did, the court should have continued the case, and, especially if it felt that the plaintiffs were somehow at fault and the defendant was not, it should have required the plaintiffs to pay all costs and expenses of the delay. I think the failure of the district court to pursue this course is an abuse of discretion and that the case should be remanded for a new trial.

If the matter of the application of Tennessee law had been (Unknown to the defendant) deliberately withheld by the plaintiffs from the district court, I would agree that the court did not abuse its discretion in proceeding as it did. But there is no intimation that such is the case.

The most that can even be claimed is that the failure to bring the law of Tennessee to the attention of the district court until November 9th was at most inadvertence, and I suggest that if there is any fault or inadvertence it must be shared by the attorneys for both sides.

In all events, if the attorney for the plaintiffs had really been wanting to waylay the defendant, all he had to do was not to bring the law of Tennessee to anyone's attention at the time of the trial, saving his error for appeal, and we would have routinely remanded the case for a new trial. As things now stand, the case was tried on an admittedly erroneous theory of law, which everyone knew during the trial, and for which the majority would afford no remedy.

I think the opinion of the majority puts an attorney situated as was the

plaintiffs into an impossible position. If he discloses to the trial court the correct theory of the case, as I conceive he should, he loses. But if he conceals from the trial court the correct theory of the case, as I conceive he should not, then he wins.

Filed July 1, 1985

U.S. COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-2181

Anthony Razzana, Earnest Wallace,
Joe Tippett, T & W Trucking Company,

Appellants,

and

Desota Trails, Inc.,

Plaintiff,

versus

Dunlop Tire & Rubber Co., Inc.,

Appellee

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE

The appellants petition for rehearing and suggestion for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judge Widener voted to rehear the case in banc; and all other

Active Circuit Judges voted against rehearing the case in banc. As a majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing, Judge Phillips and Judge Ervin voted to deny the petition and Judge Widener voted to grant the petition.

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Ervin for a panel consisting of Judge Widener, Judge Phillips and Judge Ervin.

For the court,

John M. Greacen

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-404-P

ANTHONY RAZZANO, Individually, EARNEST WALLACE and JOE TIPPETT d/b/a T & W TRUCKING COMPANY, and DESOTA TRAILS, INC.,

Plaintiffs,

vs

DUNLOP TIRE & RUBBER COMPANY,

Defendant.

J U D G M E N T

THIS MATTER coming on to be heard before the undersigned United States District Judge and a jury at the November 7, 1983 Civil Jury Term and Issues having been submitted to the jury and answered as follows:

(1) Was the Defendant Dunlop negligent in the manufacture of the subject tire?

ANSWER:_____(YES) __X_____(NO)

NOW, THEREFORE IT IS ORDERED, ADJUDGED,



AND DECREED that Judgment be entered for the Defendant and that the Plaintiffs' claims be dismissed, and the costs, not to include attorneys' fees, be assessed by the Clerk against the Plaintiff.

This 23rd day of November 1983.

Robert D. Potter
U.S. District Court Judge